No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SPENCER G. YOUNG,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States, for the District of Idaho, Eastern Division

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HON. CHARLES C. CAVANAH, District Judge.

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United States Attorney for the District of Idaho;
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STATEMENT OF THE CASE

This is an action brought by Spencer G. Young against the United States of America on a policy of War Risk Insurance. The complaint, which was filed February 4, 1932, (Tr. 9), alleges jurisdiction; plaintiff's enlistment in the United States army on July 5, 1916, and his discharge therefrom on April 28, 1919; the issuance to him

of a policy of War Risk Insurance in the sum of $10,000 on November 8, 1917; that premiums were paid on the policy through April, 1919, and the same continued in force to and including May, 1919; that while the policy was in full force and effect, plaintiff was subjected to hardships, machine gun, rifle and shell fire, and underwent exposure to the elements and suffered from the lack of shelter, food and water and was compelled to eat impure food and drink impure water and was gassed and contracted colitis, asthma, flat feet, stenosis of the pyloris, psychosis, psychoneurosis and shell shock; that as a result he has been totally and permanently disabled from a time within the effective dates of the policy; that claim was made on February 12, 1931, and was denied on January 25, 1932; that a disagreement exists; that plaintiff elects to make claim upon the original policy of War Risk Insurance and tenders to the defendant all subsequent contracts of insurance.

To this complaint defendant demurred generally and specifically and filed its motion to strike (Tr. 14, 15). The demurrer being overruled and the motion to strike being denied, defendant answered by denying all allegations contained in paragraph 6 of the complaint (Tr. 11), which sets forth the total and permanent disabilities of the plaintiff, the cause thereof and the period during which the plaintiff became totally and permanently disabled (Tr. 18), and further sets forth all the subsequent policies of insurance issued under the War Risk Insu-

rance Act of October 6, 1917, and all acts amendatory thereof and supplemental thereto. The answer was later amended to deny all allegations concerning the filing of the demand and existence of a disagreement. On the issues thus formed a trial of the cause was had before a jury on October 21, 1933, wherein defendant's motions for a directed verdict were denied (Tr. 23) and the jury returned a verdict in favor of the plaintiff (Tr. 23), on which a judgment was filed herein on October 23, 1933, against the defendant (Tr. 24). From this judgment the defendant appeals (Tr. 193).

STATEMENT OF FACTS

Plaintiff is a man thirty-nine years of age, with a 3-year high school education (Tr. 29, 65). Plaintiff's war service in France is divided into an active period from March, 1918, to October, 1918 (Tr. 53), and an inactive period from October, 1918, to April, 1919, when he embarked for the United States (Tr. 53).

During the active period the certificate of discharge, which was accepted by the plaintiff as correct (Tr. 55-56), states that plaintiff was in the following engagements: Lorraine, Feb. 28, 1918, to June 18, 1918; Champagne, July 14 to July 18, 1918; Marne, July 26 to August 4, 1918; St. Mihiel, September 12 to September 26, 1918. The certificate also shows that plaintiff's physical condition was good when discharged (Tr. 56). Plaintiff included in the list of engagements Argonne Forest (Tr. 54). During this active period, plaintiff was engaged as

a signalman, a runner and an infantryman. He was gassed four times (Tr. 57). The first time was during May, 1918 (Tr. 31, 53), after which he remained in a dugout for about one week. Then he returned to active service for about two weeks, when he was gassed a second time and remained in his dugout for a period of from seven to ten days (Tr. 58). During this period he had a gas mask, and the other boys who were with him at the time of the gas attacks went back for their food and rations and continued their activities (Tr. 58). Plaintiff then fractured his ankle, which laid him up for from ten to fourteen days (Tr. 59). He did not go to a hospital but had his ankle bandaged in the field. After this he went right ahead in his service (Tr. 60). About six weeks after the second instance, he received a third gas attack, but went ahead with his work as before as best he could (Tr. 60).. In October, 1918, he ate some gassed food, as a result of which he began his inactive period. During the active period plaintiff states that he was subjected to terrific gun fire; that his dugout was blown in; that he acted as a runner in periods of great danger; that he was without necessary food; that he acted as guard of dead soldiers and that during all of this time, because of these things, he became nervous, could not sleep and jumped at loud noises. However, plaintiff went right on with his duties up to the last gas attack and according to his own statement suffered more than others who were at the same place at the same time of these several gas attacks.

During the inactive period, plaintiff was at a hospital from October, 1918, to January 1, 1919 (Tr. 53), and then was transferred to a convalescing hospital to about April 1, 1919. With the exception of the medical aid which he received at the time his ankle was fractured, there was no medical service during the active period. While at the convalescing hospital, plaintiff was placed in the diarrhea ward (Tr. 40). The service record shows that plaintiff had no trouble with diarrhea and vomiting after November 8, 1918 (Tr. 41), and that on December 6, 1918, he was discharged to duty (Tr. 61).

Plaintiff does not agree with the service record concerning hospitalization (Tr. 62), although about December 3, 1920, when applying for compensation, plaintiff in writing stated the nature and extent of his disability and stated that the disability began in April, 1920, as soon as he did any heavy work (Tr. 63, 64). Plaintiff believed that that statement must have been true to the best of his knowledge when he made it (Tr. 62). On January 29, 1927, in application for conversion of insurance, plaintiff stated, "Question No. 6—Are you now permanently and totally disabled (Answer yes or no)," and the answer was "No." "Question No. 8,—Have you ever made application for government compensation?" Answer, "Yes" . . . "Question,—For what disability? Stomach condition." At the time this application and statement were made, plaintiff believed his answers therein contained to be true (Tr. 69).

On June 30, 1921, plaintiff made application for reinstatement of government life insurance, in which he stated that he had made application for government compensation in December, 1920, based on being gassed in action (Tr. 66). Plaintiff's written application for disability allowance, dated July 11, 1930, claims disability on account of asthma (Tr. 70). The service record shows that the plaintiff at the time of his discharge the latter part of April, 1919, answered the question, "Do you have any reason to believe at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disease or impairment of health whether incurred in the military service or not," in the negative. He explains this by saying that, "I wanted to get home" (Tr. 42).

Ever since April 30, 1929, plaintiff has had the advice and assistance of the Regional Manager of the Veterans' Bureau, Boise, Idaho, in furthering and securing additional benefits under the provisions of the World War Veterans' Act (Tr. 73).

Plaintiff arrived home about May 3, 1919, and continued working for his father on the farm all that year. He was also on his father's farm in 1920. During this time he herded sheep for Mr. Hulett for about thirty days and helped him lamb. He received a check of $40.00 for the lambing. He was on both day and night shift. About six more helped with this work (Tr. 72). On his father's farm he helped with the chores, hauling manure, riding

after cows, changing water, riding a two-way plow one-half of the time during that week and taking care of horses more than half of the time (Tr. 43). In 1920 he tried to weed beets, but the crop was a failure (Tr. 44). In 1921 he worked for Mr. Robinson on the farm for $60.00 a month. He plowed until the crops were in and worked every day with the exception of Sundays. He was here two and a half months. He also rode for cows, rode after the mail, rode up in the hills and milked cows (Tr. 45). After this he went home for a month, doing chores and light work. He then worked for Gruder Jon as a water monkey, tending his team and hauling two and sometimes three tanks of water a day to the machine. For this he received $100.00 a month for himself and team, working about six months. During the winter of 1921 and 1922, plaintiff kept Mr. Robinson's place, receiving only his board. During this period there was no farm work to do, but when he did farm work he received $60.00 a month in addition to his board (Tr. 76). During the fall and winter there was nothing to do except milk the cows part of the time and feed some chickens (Tr. 76). In February or March, 1922, (Tr. 45) plaintiff began driving a car for a salesman for the J. B. Colt Company. Later he became installing agent for the company, setting up acetylene lighting plants (Tr. 75), the minimum charge for installation being $25.00 and the maximum $75.00. Plaintiff installed about a dozen plants in the fall of 1922 (Tr. 76). When he worked for the J. B. Colt Company on a commission, he earned about

$50.00 a month, and when he was installing for the company, he made about $75.00 per month (Tr. 46).

In January, 1923, plaintiff married and moved to a house on his father's farm and did some light work in the beets. He then had an operation. In the fall of 1923 he worked for a laundry, watching a drier and polishing and cleaning the washers (Tr. 47). He had no one to help him in this work (Tr. 76), but when he was required to fire the boiler, he was unable to do the work. He asked for this job and did all the work required of him excepting shoveling the coal. He quit this job (Tr. 76). He then had a contract with the gas company for unloading three cars of coal, one car at a time. He unloaded some of the coal himself and hired men to help him. He received $30.00 per car for this work, making a net of $15.00 a car. He finished this contract and then sought work elsewhere (Tr. 47, 77).

About the 1st of April, 1924, he began working for a farmer named Randall. He stayed there three or three and a half months and received $50.00 a month with a bonus of $5.00 a month if he stayed through the summer. He did not stay through the summer. While here he drilled grain with assistance, plowed, helped with the chores. This work tired him and he came late to work. He was discharged the latter part of July (Tr. 47-48).

After this he moved to a ranch near his father's farm, where he stayed during 1925, 1926 and 1927. The ranch contained sixty acres, with forty acres under cultivation.

During those years he put in wheat and potatoes. The first year he ran half of the place and his father ran the other half. Plaintiff plowed and exchanged work with his father. Plaintiff rode a cultivator part of the time and harrowed peas. During this period, he had hired help. The heavy work caused pains. In 1925, and regularly after that, plaintiff was in the Veterans' Hospital at Boise.

After leaving the ranch, he moved to Idaho Falls and got a job in the sugar factory picking out tailings. He had no help on this job. He then went to the Veterans' Hospital. Intermittently ever since he left the J. B. Colt Company, he has done peddling as an odd job, which made him $10.00 a month (Tr. 49, 77).

In 1929 he worked for the Sunnyside Dairy for about three months. He delivered milk. The work ended by mutual agreement. After that he sold musical instruments. In the fall of 1929 he moved to Boise and in the spring of 1930 he acted as a collector for the Metropolitan Insurance Company for about three months, receiving about $100.00 per month (Tr. 50). He also testified that this employment ran for four or four and a half months. During this time he drew $30.00 a week. He does not know how much he received as commissions (Tr. 75).

In the winter of 1930 or the spring of 1931, plaintiff went to California for five months. While here he did some cultivating and worked for a month or two, receiv-

ing in all $100.00 (Tr. 50). During the summer of 1931 he took up a homestead near Idaho Falls and has been living there in the summer ever since. He has put up some fencing and shingled his cabin (Tr. 50-51).

In 1932 he sought and received a job at the Shelley Sugar Company, which continued two and a half months. He received $2.30 a day. His job was to measure sirup. While here he had a sick spell. It was not heavy work but required someone to perform the duty (Tr. 51, 77).

Plaintiff was married in 1923 and at that time considered himself able to support himself and wife (Tr. 78).

The work record shows that plaintiff engaged in farming, herding sheep (Tr. 72), choring, cultivating, milking, feeding, cleaning ditches (Tr. 84, 85), weeding beets, plowing, water monkey (Tr. 45), driving a car, installing light plants (Tr. 75), working in laundry, unloading coal, general farming (Tr. 88), hauling potatoes (Tr. 89), picking potatoes (Tr. 91), figuring and estimating (Tr. 98), working in a sugar factory, delivering milk, insurance collector and homesteading. This work was not always steady but in many instances he kept on (Tr. 104, 106). In some respects he worked but worked slowly (Tr. 100, 105). Work seemed to make him thin, pale and to perspire (Tr. 84, 88, 89, 99, 107) and resulted in fitful night rest (Tr. 82, 98, 107). Plaintiff claimed $2.65 per diem for loss of time while attending the Veterans' Hospital.

The medical testimony on behalf of the plaintiff shows

that Dr. Rigby, plaintiff's cousin, operated upon the plaintiff in 1923 for appendicitis and at that time took a history of the case. The doctor stated that the plaintiff was totally and permanently disabled in 1923 (Tr. 119, 120). The cause of the disability was shell shock and neurasthenia (Tr. 119). A hypothetical question (Tr. 120-139) was then put to the doctor by plaintiff's attorney, which included the definition of total and permanent disability (Tr. 140) and which also included the following: 'Q. Assuming that definition, Doctor, and the facts as stated and testified to— A. In my opinion, according to the definition and history and assuming it is correct, I would say that he was totally and permanently disabled at that time. Q. Was he totally and permanently disabled at the time of his discharge? A. Yes, sir." (Tr. 141).

Dr. Lowe, a medical witness for the plaintiff, was interrogated on direct examination as follows: "Q. You have heard the testimony and you have heard the history here of this man, Spencer Young. A. Yes, sir. Q. And you have in mind that history and you also heard the evidence in this case? A. Yes. Q. And you have in mind the facts narrated in this history? A. Yes." The definition of total and permanent disability was then given the witness and he stated it was his opinion that the plaintiff was totally and permanently disabled at the time he arrived at his home, May 3, 1919 (Tr. 147-148). This witness also included in his opinion his belief that there is something organically wrong with the plaintiff (Tr. 157).

Dr. H. E. Foster, a medical witness for the defense, admittedly qualified to testify as a physician and surgeon and neuropsychiatrist (Tr. 164), gave his opinion that the plaintiff was not totally and permanently disabled and that he would be able to carry on in many occupations (Tr. 169).

ASSIGNMENT OF ERRORS

I.

The Court erred in overruling defendant's objection to plaintiff's testimony as follows, to-wit:

> "Q. Your service record contains the statement by you at that time under declaration of soldier where the question is asked if you have any reason to believe at the present time you were suffering from the effects of any wound, injury or disease or that you have any disease or impairment of health, whether incurred in the military service or not, and in reply to that you answered 'No.'
>
> A. Yes, I did.
>
> Q. Why did you do that?
>
> A. I wanted to get home.
>
> MR. SLAUGHTER: I object to that as an attempt to impeach the plaintiff's own witness.
>
> THE COURT: Overruled."

II.

The Court erred in overruling defendant's objection to the testimony of Mrs. Spencer G. Young, as follows, to-wit:

"Q. About how much of the time did he work on that job?

A. We worked perhaps two or three hours a day, and I did part of the work, caring for the chickens and all the light work that it was possible for me to do.

MR. SLAUGHTER: I move that part of the answer with reference to what she did and had to do be stricken. It is not responsive and further not material.

THE COURT: Overruled."

III.

The Court erred in overruling defendant's objection to the hypothetical question put to the witness, Dr. Charles R. Lowe, in the following form and manner, to-wit:

"Q. You have heard the testimony and you have heard the history here of this man Spencer Young?

A. Yes, sir.

Q. And you have in mind that history and you also heard the evidence in this case?

A. Yes.

Q. And you have in mind the facts narrated in this history?

A. Yes.

Q. And the definition for permanent and total disability is as follows: Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Considering the history I read this morning and the definition I have given you, I will ask you to state whether or not you have an opinion as to whether within that definition Mr. Young was totally and permanently disabled at the time he arrived at his home which he testified was May 3, 1919?

A. Yes.

MR. SLAUGHTER: I object to the witness answering that question because the hypothetical question, included in this question, was not based on a substantial statement of the facts and contained matter prejudicial and stricken from the record and it invades the province of the jury.

THE COURT: I will state to you, gentlemen of the jury, that any matter the court has stricken from

the record during this trial you are not to consider in considering the answer to this hypothetical question. I will overrule the objection.

MR. SLAUGHTER: Exception, please.

Q. You say you have an opinion?

A. Yes, sir.

Q. What is it?

A. That he was totally and permanently disabled at the time he reached home.

Q. What in your opinion was the disease or diseases that made him permanently and totally disabled?

A. Shell shock and neurasthenia.

Q. Is that a subdivision of psychoneurosis?

A. It is.

Q. Do you have an opinion as to when Mr. Young became totally and permanently disabled?

A. Yes, sir.

Q. When was it?

A. I would place the date at the time he came home.

Q. In your opinion will he ever recover from this condition of total and permanent disability?

A. I don't think he will."

IV.

The Court erred in denying defendant's motion for a directed verdict presented after plaintiff had rested, which was as follows:

> "MR. SLAUGHTER: Comes now the defendant at the close of the evidence for the plaintiff, the plaintiff having rested, and moves the court to direct a verdict in favor of the defendant and against the plaintiff on the ground that the evidence is insufficient to show that the insured became totally or permanently disabled or totally and permanently disabled within the meaning of the insurance policy, at a time when the policy was in full force and effect, that is between November 8, 1917, and May 31, 1919, and upon the further ground that in event a verdict was found in favor of the plaintiff and against the defendant, the evidence would be wholly insufficient to sustain such a verdict or support any judgment rendered thereunder.
>
> THE COURT: The motion is denied.
>
> MR. SLAUGHTER: Exception, please."

V.

The Court erred in overruling defendant's motion for a directed verdict renewed after the plaintiff and defendant had both rested, as follows, to-wit:

> "MR. CASTERLIN: At this time the govern-

ment renews its motion as made at the conclusion of the plaintiff's case.

THE COURT: It is denied."

VI.

That the evidence is wholly insufficient to support the verdict in that the evidence does not establish that the plaintiff was or became totally and permanently disabled while his war risk insurance contract, upon which this action is predicated, was in full force and effect.

VII.

That the verdict and judgment were contrary to law.

POINTS AND AUTHORITIES

I.

Under the War Risk Insurance Act, plaintiff has the burden of proving (1) existence during the effective dates of the policy of insurance of total disability, and (2) that such total disability was then and ever since has been and probably will continue to be permanent.

U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800.
U. S. v. Rentfrow (CCA 10), 60 Fed. (2d) 488.
U. S. v. Diehl (CCA 4), 62 Fed. (2d) 343.

II.

A case should never be submitted on a question of probabilities with direction to find with the greater prob-

ability. A mere scintilla of evidence is not sufficient to warrant a submission of issue of facts to a jury.

U. S. v. Lawson (CCA 9), 50 Fed. (2d) 646.
Nichols v. U. S. (CCA 9), 68 Fed. (2d) 597.

III.

The question of total and permanent disability is for the jury only if and when reasonable men may differ on the facts.

Nicolay v. U. S. (CCA 10), 51 Fed. (2d) 170.
U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800.

IV.

If from the facts and the inferences to be drawn therefrom a verdict, if returned, would have to be set aside, the court should direct a verdict in the first instance.

Nichols v. U. S. (CCA 9), 68 Fed. (2d) 597.
Slocum v. New York Life Ins. Co.,
228 U. S. 364, 369.

V.

An unresponsive answer should be stricken, especially when the answer is immaterial.

Wigmore On Evidence (2d Ed.), Par. 18,
Note 3; Par. 785.
Marinoni v. State (Ariz.), 136 Pac. 626.

VI.

A party may introduce conflicting statements to de-

stroy probative effect of testimony of own witness only where surprised by witness' adverse testimony, or in case of entrapment.

Hickory v. U. S., 151 U. S. 303,
14 Sup Ct. 334, 38 L. Ed. 170.

Fong Lum Kwai v. U. S. (CCA 9),
49 Fed. (2d) 19.

Murray v. Third Nat. Bank (CCA 6),
234 Fed. 483, 491.

Putnam v. U. S., 162 U. S. 687, 691;
16 Sup. Ct. 923; 40 L. Ed. 1118.

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Sneed et al v. U. S. (CCA 5),
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Randazzo et al. v. U. S. (CCA 8),
300 Fed. 794, 797.

St. Clair v. U. S., 154 U. S. 134;
14 Sup. Ct. 1002; 38 L. Ed. 936.

Levy v. U. S. (CCA 8),
35 Fed. (2d) 483, 484.

VII.

An opinion cannot be based on evidence which witness has heard, particularly if there are inconsistencies or discrepancies in the evidence. This results in weighing the evidence, which is the province of the jury.

Dexter v. Hall, 15 Wall (U. S.) 9;
21 L. Ed. 73.

People v. Le Doux (Cal.), 102 Pac. 517.
Manufacturer's Acc. Ind. Co. v. Dorgan,
58 Fed. 945.
Dunagan v. Appalachian Power Co. (CCA 4),
33 Fed. (2d) 876, 878.
(cert. den. 280 U. S. 606)

ARGUMENT

During the direct examination of the plaintiff, his Exhibit No. 1, being the service record, was admitted in evidence without objection. The plaintiff was then asked the following question,—

> "Your service record contains the statement by you at that time (April, 1919), under Declaration of Soldier, where the question is asked if you have any reason to believe at the present time you are suffering from the effects of any wound, injury or disease, or that you have any disease or impairment of health, whether incurred in the military service or not, and in reply to that you answered 'no'."

A. Yes, I did.

Q. Why did you do that?

A. I wanted to get home.

To these questions and answers objection was made that it was an attempt to impeach plaintiff's own witness. The objection was overruled. The plaintiff, having introduced the service record as a part of his case in chief,

thereby adopted each and every declaration of the plaintiff therein contained as a part of plaintiff's testimony. Having adopted the contents of this exhibit and without any preliminary questions, the witness then proceeded to testify contrary to the adopted statement of the plaintiff. In other words, plaintiff first adopted the statement that he had no reason to believe at the time of his discharge that he was suffering from disease or impairment of health and then immediately proceeded to testify orally to the contrary. We believe that the course adopted in introducing this proof comes clearly within the rule of law that a party may introduce conflicting statements only where he is surprised by the witness' adverse testimony or in case of entrapment. It cannot be claimed in this instance that the plaintiff was surprised for two reasons, —first, the plaintiff himself made both statements and he could not surprise himself; second, in the same way he could not entrap himself or be an adverse or unwilling witness. There being no surprise, no entrapment and no hostility, the plaintiff should be bound by his original statement, the proof first admitted, the same not being ambiguous, uncertain, or made under any circumstances which would require an explanation.

Mrs. Spencer G. Young testified, as set forth in the second specification of error, in response to the question, "About how much of the time did he (plaintiff) work on that job," that "we worked perhaps two or three hours a day, and I did part of the work, caring for the chickens

and all the light work that it was possible for me to do." An objection was made that the answer was not responsible and not material, with the request to have that part of the answer referring to what she did and had to do stricken. This was overruled. We believe that this was an error and that the entire answer should have been stricken under the rule that an unresponsive answer should be stricken, especially when the answer is immaterial. The question which arises in this action turns on the ability of the plaintiff to follow a gainful occupation and any testimony as to what the plaintiff's wife did is immaterial, as it does not tend to prove or disprove the issue. Proof as to what the plaintiff did is material, but proof of what third parties do is immaterial. In any event no part of the answer is responsive to the question. We believe the great weight of authority and that the better rule is that any answer which is not responsive should be stricken upon motion of either party.

Dr. Lowe was called as an expert witness by the plaintiff and his qualifications were admitted. Dr. Lowe, as stated in assignment of error No. 3, testified that he had heard the testimony in this case and that he had "heard the testimony here" of the plaintiff; that he had that history in mind and the facts narrated in the history; that based upon the testimony which he had heard and the definition as given to him, he had an opinion as to total and permanent disability and said what the opinion was. We submit that the overruling of appellant's objection to

the doctor's opinion based and given entirely upon the evidence which he had heard in this case was error, the objection being to the effect that the question as put contains matters which were stricken from the record and invades the province of the jury. There is no question but what there was conflicting evidence in plaintiff's case. One instance in particular is that contained in assignment of errors No. 1, where the plaintiff disputed the service record. It is not necessary to particularly point out other discrepancies and contradictions in the record. The witness having heard all of the evidence and the testimony in this case was required by the question given him to determine whether the plaintiff stated the truth at the time he made the statement contained in the service record or told the truth at the time he testified subsequently. This same duty was imposed upon the expert witness in respect to all other conflicting questions. The expert first had to determine where the weight of the evidence was before he could express any opinion upon the facts. In other words the witness had to determine what the facts were before he could express an opinion, and the opinion which he expressed was based and founded upon the facts which the witness elected to be true. In such a case, the witness is invading the province of the jury and is not assisting the jury to determine what the facts are but is advising the jury of what he judges the facts to be.

In respect to the testimony of Dr. Rigby, a hypothetical question was put to him (Tr. 120-140) and then the

doctor was asked to assume the definition and the facts as stated and testified to (Tr. 141). No exception was taken to this question and the stating of the question is not assigned as an error. We call the court's attention to this testimony only to assist the court in arriving at a correct conclusion in respect of the following statement:

There were only two medical witnesses in behalf of the plaintiff and, if it is found that the trial court erred in not sustaining appellant's objection to the question put to Dr. Lowe, then plaintiff is without any proper medical testimony whatsoever and without any proper medical opinion. It cannot be contended that the testimony of Dr. Lowe is the same as other proper testimony and therefore is not prejudicial of appellant's position, even though there was no objection to Dr. Rigby's opinion. To permit Dr. Lowe to corroborate Dr. Rigby by improper expert opinion would materially impress the jury in support of plaintiff's case and would for that reason be highly prejudicial to the defendant-appellant. We believe that the correct rule of law is that an opinion cannot be based on evidence which the witness has heard, but an opinion must be based upon a hypothetical question stated in conformity with the established rules of evidence.

The remaining assignments of error to the effect that defendant's motions for a directed verdict should have been granted and that the evidence is insufficient to support the verdict and therefore the same is contrary to law

will all be discussed together. We might first remark that, even if the evidence, exclusive of the medical testimony, might have been sufficient to allow the case to be submitted to a jury, without conceding the fact, yet the evidence as a whole, including that which should have been stricken and that which should not have been permitted to go to the jury, clearly warrants the conclusion that the court should have granted a motion for a directed verdict. Taking up the evidence, omitting the medical testimony and the portions which should have been stricken, we believe that there is in this case a sufficient work record, coupled with sufficient medical testimony on the part of the defendant, to warrant the court in granting a motion for a directed verdict. The complete war record shows that from March, 1918, to October, 1918, the plaintiff was active in military service and that after every engagement the plaintiff returned to active service and performed the duties of a soldier. This is made to appear by reference to the statement of facts which refers to the transcript. Plaintiff testified positively that when he was gassed and required to remain in a dugout, all of the other soldiers who were with him at the time he was gassed performed their regular duties. Plaintiff does not attempt to explain that his condition was different from that of other soldiers who performed their regular services, and in addition to this failure to so explain, plaintiff admits that in each instance excepting the last, he did return to actual active duty. There was no medical service during plaintiff's active period, and the service record

does not show any trouble with diarrhea and vomiting after November 8, 1918. It does show that on December 6, 1918, he was discharged to duty.

Plaintiff on two occasions, first, when he made the statement in his service record, and second, when he applied for compensation on December 3, 1920, stated that he had no disability at the time he was discharged from the army. The first instance is the statement which has been discussed under the first assignment of error and the second is contained in defendant's Exhibit No. 5, where it appears that plaintiff claimed his disability began in April, 1920 (Tr. 63-65). Plaintiff also stated that at the time he made his claim for compensation he believed that the statement that his disability began in April, 1920, was correct. This corroborates and substantiates the statement which appears in the service record. Again on January 29, 1927, in his application for conversion of insurance, plaintiff again stated that he was not then permanently and totally disabled and at the time he made this last statement plaintiff believed the answers to be true. On July 11, 1930, plaintiff's application for disability allowance is based on asthma and makes no reference to any disability now appearing in this action. After having expressed his opinion so many times and having stated that on each occasion he believed the statements to be true when he made them, we are forced to the conclusion that plaintiff believed he was not totally and permanently disabled as late as January 29, 1927, and

that as late as July 11, 1930, although claiming disability, he did not believe that his disability then existed by reason of any of the infirmities stated in his complaint.

Plaintiff's work record is contained in the statement of facts and it is not necessary to review it for the purpose of this argument. During the period from 1919 to the trial of this cause, plaintiff worked at various occupations. Although this work is not continuous, it is varied in character and shows that he was able to carry on, especially in view of his admissions through all of the years that he was not totally and permanently disabled. Durin gthe year 1921, plaintiff farmed for $60.00 a month, working every day excepting Sunday, earning $150.00. He worked as water monkey for $100.00 a month for himself and team, earning approximately $600.00. During the balance of this year he was at his home or working on a ranch for his board. While working for his board, there was no farm work to do. During the year 1922, plaintiff installed lighting plants, earning approximately $600.00, figuring the average price for that kind of work. During that year he earned from $50.00 to $75.00 per month for the time he was working. During the year 1924 from April 1st to about August 1st, a period of four months, he worked on a farm for $50.00 a month or $55.00 a month, according to his employer. During 1925, 1926 and 1927, he worked on a 60-acre ranch with 40 acres under cultivation. There is no showing that during this period he did not make a living for his

family. In 1929 he worked three months for a dairy and then moved to Boise. During 1930 he worked for three months for the Metropolitan Insurance Company at $100.00 per month, approximately, not figuring commissions.

We submit, in view of the work record as outlined here, and in the statement of facts, taken together with plaintiff's several admissions that he was not totally and permanently disabled at late as the year 1927, it is affirmatively shown that there is not sufficient evidence to sustain the verdict in this case and that the motions for a directed verdict should have been granted, particularly at the close of defendant's testimony. This is for the reason that all of plaintiff's proof is as consistent with the theory of the defendant in this action as with the theory of the plaintiff, and consequently there is no preponderance of evidence whatsoever in favor of the plaintiff.

Attention is also called to the several statements made by the plaintiff in respect of his disabilities to show that there is considerable conflicting proof of a material nature which the expert witnesses had to weigh and determine before it was possible to render or give an expert opinion based upon the questions finally submitted.

It is the contention of the appellant in this case, and we believe the contention should be sustained, that the judg-

ment entered in this case should be reversed and the cause remanded for a retrial.

Respectfully submitted,

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Service and receipt of copy of the foregoing Brief this .....day of April, 1934, is hereby acknowledged.

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Attorney for Appellee.